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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-8301

BROOKSIDE CORPORATION, INC.,
Petitioners,

versus

INTERNATIONAL HARVESTER CO., INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Brookside Corporation, Inc. pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, reversing a decree rendered by the United States District Court for the Southern District of Alabama in Petitioners' favor.

I

OPINIONS BELOW

A. This is a Petition to the United States Court of Appeals for the Fifth Circuit and specifically to its

opinion dated May 29, 1975. This opinion is reported at 513 F 2d 762 (5th Cir. Ala. 1975). The opinion is set out in full in Appendix A hereto.

B. There is no written opinion of the District Court, but the Order of the Court granting the motion to dismiss the cross-claim for lack of jurisdiction over the Defendant Brookside Corporation dated August 16, 1974 and the corrected final judgment as to all parties making final the judgment in favor of Brookside Corporation for want of jurisdiction over the person of Brookside Corporation entered on the 4th day of November, 1974, are set out in full in Appendix B hereto.

II

JURISDICTION

A. The judgment of the Court of Appeals for the Fifth Circuit was made and entered on May 29, 1975 and is published at 513 F 2d 762 (5th Cir. Ala. 1975). A copy of the judgment is printed in Appendix C hereto. On June 24, 1975, Petitioners timely filed in the Court of Appeals a *petition for rehearing en banc*, and alternatively, for rehearing. By Order dated October 22, 1975, the Court of Appeals denied said Petition, a copy of said Order is appended hereto as Appendix D.

B. On October 29, 1975, Petitioners filed an application with the Court of Appeals for a stay of the mandate within which to make application to this Honorable Court for a writ of certiorari, and on November 6, 1975, the Court of Appeals granted a stay

of the mandate to December 6, 1975; the Clerk of the Court of Appeals' letter advising of the stay of the mandate is printed in Appendix E hereto.

C. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

III

QUESTION PRESENTED

The Respondent herein, International Harvester Company, Inc., manufactures and assembles trucks at its Ft. Wayne, Indiana plant. Petitioner herein, Brookside Corporation, Inc., an Indiana corporation, manufactures fan blades at its McCordsville, Indiana plant and sells fan blades in Indiana to International Harvester in Ft. Wayne, Indiana. Garvis Sells was injured in Alabama while driving his employer's truck when a fan blade allegedly broke off from the engine, penetrated the floorboard, and severely cut Sells' foot. Sells sued the truck manufacturer, International Harvester Company, which is qualified to do business in Alabama, and the fan blade manufacturer, Brookside Corporation, which is not. International Harvester cross-claimed against Brookside for indemnity. Service was obtained under the Alabama Long-Arm Service Statute. The District Court granted Brookside's motion to dismiss both the Complaint of Sells and the Cross-Complaint of International Harvester for the lack of in personam jurisdiction. Sells then settled his claims with International Harvester and the District Court entered an Order dismissing the action on the merits with prejudice as to

all defendants entering an express judgment in favor of Brookside for want of jurisdiction over the person of Brookside Corporation on the cross-claim. Sells having settled all claims did not appeal. International Harvester appealed claiming error in the dismissing of the Cross-Complaint.

The question presented for review on this Petition is:

Does the Alabama Long-Arm Statute concerning non-resident corporations provide the necessary empowering state legislation and statutory base for a Federal District Court in Alabama to exercise in personam jurisdiction over a non-resident corporation who does no business in Alabama but who makes and sells fan blades in the State of Indiana to a national distributor who manufactures and assembles a finished product in Indiana for sale in Alabama, and other states; and

does requiring a component manufacturer to defend a products' liability indemnity claim filed by its vendee in a foreign jurisdiction where the component manufacturer does no business and has no contacts violate the due process clause of the Fourteenth Amendment to the United States Constitution?

IV

STATUTES INVOLVED

A. The statute involved is Title 7, Section 199 (1) Code of Alabama 1940 (recomp. 1958) as amended. This statute is printed in Appendix F hereto.

B. The 14th Amendment to the United States Constitution. USCA Const. Amend. 14 Section 1. This Amendment is printed in Appendix G hereto.

V

STATEMENT OF THE CASE

The basis of Federal jurisdiction in the Court of first instance, the United States District Court for the Southern District of Alabama, is that this is the case of diversity jurisdiction under 28 U.S.C. Section 1332 (a) (1)-(3).

On June 29, 1972, Garvis Sells was driving his employer's truck at or near the intersection of Alabama Highway 21 and Interstate 65 when allegedly a fan blade broke off from the engine, penetrated the floorboard and cut Sells' foot. Sells sued the Respondent truck manufacturer, International Harvester Company, and the fan blade manufacturer, Brookside Corporation, Petitioner herein. The Respondent International Harvester cross-claimed against Brookside for indemnity. Both Sells and International Harvester served Brookside under the Alabama Long-Arm Service Statute, and Brookside filed a motion to dismiss both the Complaint and Cross-Complaint for the lack of in personam jurisdiction. The District Court dismissed Sell's claim against Brookside and also dismissed International Harvester's cross-claim against Brookside for lack of in personam jurisdiction. Brookside's motion to dismiss was granted on August 16, 1974. From that point on Brookside took no part in the court proceedings. Sometime thereafter, Garvis Sells settled all claims with International Harvester

and on November 4, 1974 the District Court entered a corrected final judgment against all parties dismissing the Plaintiff's action on the merits with prejudice and entered an express order finding a final judgment in favor of Brookside Corporation for want of jurisdiction over its person on the cross-claim.

Garvis Sells, having settled all claims, did not appeal. International Harvester appealed claiming that the Trial Court erred in dismissing the cross action.

The Court of Appeals reversed the District Court and held that it had considered the Alabama Substituted Service Statute in the past and noted that it extended to the limits of due process. The Court of Appeals further held that "The Supreme Court of Alabama has consistently recognized that the issue of jurisdiction pursuant to substituted service of process under Alabama's Long-Arm Statute is not controlled by State law but rather poses a Federal question of whether subjection of the non-resident defendant to the sovereignty of Alabama comports with Federal due process." *King & Hatch, Inc. v. Southern Pipe & Supply Company*, 435 F 2d 43, 44 (5th Cir. 1970). In support of the holding that the Alabama Substituted Service Statute extends to the limits of due process, the Appellate Court cited its own decision of *King & Hatch v. Southern Pipe & Supply Company*, (Supra) and *In Re Martin*, 281 Ala. 135, 199 So. 2d 836 (1967); *New York Times Company v. Sullivan*, 273 Ala. 656, 144 So. 2d 25 (1962), rev'd on other gds., 376 U.S. 254, 84 S. Ct. 710, 11 L Ed 2d 686, (1963); *Boyd v. Warren Paint & Color Co.*, 254 Ala. 687, 49 So. 2d 559, (1950). The Court of Appeals

further held that a manufacturer which sells its product to a national distributor, knowing the product will be used in all states, can be required to defend a products' liability suit in that state where the accident occurs without violating due process. The Appeal Court cites its own decisions of *Mack Trucks, Inc. v. Arrow Aluminum Castings Company*, 510 F 2d 1029 (5th Cir. Ga. 1975) and *Coulter v. Sears Roebuck Inc.*, 426 F 2d 1315 (5th Cir. Tex. 1970).

VI

REASONS FOR GRANTING THE WRIT

The Decision of the United States Court of Appeals for the Fifth Circuit herein conflicts in principal with this Court's decision of *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L Ed 1283 (1958), extends the reach of Alabama's Long-Arm Statute beyond its statutory base, and is in direct conflict with the decisions of other Federal Courts of Appeal and is in direct conflict with the lower Courts own cases of:

Dooley v. Payne, 326 F 2d 941 (5th Cir. Ala. 1964)

Davis v. Casco Products Corporation, 381 F 2d 470 (5th Cir. Ala. 1967)

Tetco Metal Products, Inc. v. Langam, 387 F 2d 721 (5th Cir. Ala. 1968)

Barrett v. Browning Arms Company, 433 F 2d 141 (5th Cir. Ala. 1970)

and the Alabama District Court case of:

> *Lindsey v. Champion Home Builders Company, Inc., et al*, 374 F Supp 1005 (M.D. Ala. 1974)

1. The undisputed facts of the instant case are that Petitioner Brookside Corporation, is an Indiana Corporation qualified to do business only in the State of Indiana and that it has never done any business in Alabama nor entered into any contract or agreement or understanding with any person, firm or corporation located within the State of Alabama for the sale, distribution, repair or maintenance of any of its products or service within the State of Alabama. Further, Brookside never assembled, installed, maintained or serviced any products in the State of Alabama or agreed to do so. Brookside manufactured in Indiana and sold in Indiana a fan blade to International Harvester whose assembly plant for certain trucks is located at Ft. Wayne, Indiana. The only allegation of any connection with the State of Alabama comes in an affidavit wherein it is alleged that a great many engine fans manufactured by Brookside Corporation, Inc. have been sold and offered for sale by International Harvester Company in the State of Alabama, all with the knowledge of Brookside Corporation, Inc. There is no allegation that Brookside Corporation has any control over any of the distribution patterns and sales territories of International Harvester Company or any control over what state or states International Harvester Company sells the certain truck type identified in the affidavit of International Harvester. The Court below gave no consideration to the language of

the Alabama Long-Arm Statute concerning "doing of business" nor to many of its own decisions which have held that in personam jurisdiction exercised by the Federal District Court in Alabama can extend no further than the base provided for by the forum state, particularly where the Alabama Long-Arm Statute required the "doing of business" before the exercise of such jurisdiction. The lower Court also failed to give any consideration to the language of this Court in *Hanson v. Denckla* (Supra).

In *Hanson v. Denckla*, Supra, a case admittedly not involving a products' liability question, this Court acknowledged the trend of expanding personal jurisdiction over non-residents as previously decided in the case of *International Shoe Company v. Washington*, 326 U.S. 310, 90 L Ed. 95, 66 S. Ct. 154, and *McGee v. International Life Insurance Company*, 355 U.S. 220, 2 L. Ed. 2d 223, 78 S Ct. 199. However, this Court noted the constitutional self limitation of the trend by holding:

> "That it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. (cite omitted). Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts'

with that state that are a prerequisite to its exercise of power over him. (cite omitted).

* * *

It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities *within* the forum state, thus invoking the benefits and protections of its laws." (cite omitted). (emphasis supplied)

The Appellate Court has, by its opinion here for review, extended the limit of the Due Process Clause of the Fourteenth Amendment beyond the limitations heretofore announced in *Hanson v. Denckla*, (Supra). The Due Process Standard is two pronged. First, do there exist those "minimal contacts" with the forum state. Secondly, has the Defendant done some act by which it has purposefully availed itself of the privilege of conducting activities *within* the forum state thus invoking the benefits and protection of the laws of Alabama.

There is no fact in the record which supports a conclusion that Brookside Corporation has done any act by which it has purposefully availed itself of the privilege of conducting activities within the State of Alabama.

2. The Court of Appeals has, in its opinion here for review, completely ignored its own decisions concerning the rules of construction and application of the Alabama Long-Arm Statute. The Alabama

Long-Arm Statute is itself a self-limiting enactment which states that Alabama Courts will only exercise in personam jurisdiction over non-resident defendants if they "shall do any business or perform any character of work or service in this State . . ." and the action sued on is one ". . . accruing or resulting from the doing of such business, or the performing of such work or service . . .".

In *New York Times v. Connor*, 291 F 2d 492 (5th Cir. Ala. the lower court held:

"The rule of construction of a statute such as this Section (Title 7, Section 199 (1) Code of Alabama) being one in contravention of the general rule that a party is not subject to suit in personam outside his own jurisdiction, is that the statute must be strictly construed."

Additionally, the lower court failed to recognize its own opinion in *Barrett v. Browning Arms Company*, 433 F 2d 141 (5th Cir. Ala. 1970), a case involving a products' liability question. There the Plaintiff owned a Browning shotgun, the barrel of which he detached and took to a hardware store in Ensley, Alabama to have a polychoke attached. The Plaintiff directed the store owner to send the barrel to Browning Arms Company in St. Louis, Missouri to have the work accomplished. The lower court holds:

"This was done in 1957 and it appears undisputed that at that time Browning Arms Company was not qualified to do business in Alabama, it had no designated agent in

Alabama for service of process, nor did it have any office, property, telephone listing, warehouse, or any other place of business. Further, it did not actively solicit any business in Alabama by any salesman or agent. The Company's only activity in Alabama was the furnishing of retailers with price lists and catalogs."

The lower court further holds:

"Browning, of course, contends that under both Section 193 and Section 199 (1), the cause of action must accrue, result from, or arise out of the company's doing business or performing work or services in the State of Alabama. It seems clear that in 1957 when the polychoke was installed in St. Louis, Browning was not 'doing business' or 'performing work or services' in the State of Alabama so as to make it amenable to service of process in that forum. *Tetco Metal Products*, Supra; *Davis v. Casco Products Corporation*, 381 F 2d 470 (5th Cir. 1957); *Dooley v. Payne*, 326 F 2d 941 (5th Cir. 1964); *Ex Parte Emerson*, 270 Ala. 697, 121 So 2d 194 (1960).

The lower court also held:

". . . however, the jurisdiction so imposed can extend no further than the statutory base provided for by the forum state." (cite omitted).

In *Barrett v. Browning Arms Company*, (supra), the lower court relies on a products' liability case from the State of Alabama which construes the Alabama Long-Arm Statute. That case is *Ex Parte Emerson*, (supra). There the Complainant alleged that the Defendant sold products to a retail druggist in Tuscaloosa, Alabama for resale to the public for use for the removal of corns and calluses and that the product contained harmful ingredients which were imminently or inherently dangerous when used as directed. Service of process was attempted under the Alabama Long-Arm Statute. The *Emerson* Court recognized that it had earlier held in *Ex Parte Smith*, 258 Ala. 319, 62 So. 2d 792, that it would equate the service on non-resident motorists. (Section 199) with service on non-residents who do business in the State (Section 199(1)). From there the *Emerson* court concluded:

"From our study of the evidence in this case we do not think it necessary for us to deal with the decisions and statutes which have expanded or changed the doctrines of *Pennoyer v. Neff*, supra. This case was submitted to Judge Warren on a deposition of Dr. J. B. King, and deposition of H. W. Holland. It is our opinion that this testimony shows that the men selling Pedolatum in Alabama were either selling a product which they had purchased or were independent contractors and therefore Dr. J. B. King was not doing business within the State of Alabama.

* * *

Dr. J. B. King did not in any way select the route or choose the territory which these men

covered and these men selected their own methods and means of selling the product." 121 So. 2d at 920.

Prior to the *Barrett v. Browning Arms Company*, (supra) decision, the lower court held in *Tetco Metal Products, Inc. v. Langam*, 387 F 2d 721 (5th Cir. Ala. 1968) a products' liability case that:

> "Tetco's only connection with Alabama consists of shipping water heaters to independent Alabama retailers in response to their unsolicited orders, and receiving the warranty cards from Alabama purchasers."
>
> * * *
>
> "We are convinced that Tetco's connections with Alabama simply do not constitute doing business under Alabama law."

Prior to *Tetco*, (supra), the lower court held in *Davis v. Casco Products Corporation*, 381 F 2d 470 (5th Cir. Ala. 1967) another products' liability case, that it would affirm the order quashing substituted service of process under Alabama's Long-Arm Statute when the lower court found that the Defendant Casco's only connection with Alabama was the sale of its products through a Jacksonville, Florida brokerage agency. The lower court was unable to find the regular and systematic solicitation of business within the State of Alabama and could not find any direct commission payments to any manufacturer's representatives in Alabama.

Prior to *Casco*, (supra), the lower court in *Dooley v. Payne*, 326 F 2d 941 (5th Cir. Ala. 1964) another products' liability case, affirmed the quashing of attempted service of process under the Alabama Long-Arm Statute holding as follows:

> "The Broaster Company -partners did no business in Alabama. The sale it made of the equipment alleged to have been defective and dangerous was made in Illinois or Louisiana, not Alabama. It had no agents or representatives in Alabama for the solicitation of business, for giving instructions as to the operation of its products, for the servicing of equipment made by it, or for any other purpose. It had no office, plant, or agency in Alabama. None of the partners resided there. All that can be said is that the Broaster Company produced a piece of equipment, sold and delivered it to a distributor in Louisiana, having an exclusive right of resale in Alabama; and after some time and some years, the equipment was sold to Dooly in Alabama. *The Alabama statute requires the doing of business or the performing of work or service in the state in order to permit substituted service. We need not consider whether a broader statute would withstand a challenge on constitutional grounds.* (emphasis supplied).

The lower court's opinion now up for review, takes no notice of its earlier decisions nor does it attempt to directly overrule them nor distinguish them. Additionally, Federal District Courts sitting in Alabama have consistently rejected the "stream of commerce"

theory that the lower court now imposes. The District Court in *Lindsey v. Champion Home Builders Company, Inc.*, 374 F Supp 1005 (M.D. Ala. 1974) held as follows:

> "Both parties have cited to the court numerous Fifth Circuit cases apparently substantiating their positions. This Court is of the opinion that the cases cited by the Third-Party Plaintiff are distinguishable from those cited by the Third-Party Defendant and from the case at hand. Judge Gewin in the case of *Coulter v. Sears, Roebuck & Company*, 426 F 2d 1315, stated that cases of this type always present two questions: First, whether the state Long-Arm Statute authorizes the exercise of jurisdiction over the defendant, and second, whether the exercise of jurisdiction,if authorized would violate the due process clause of the Fourteenth Amendment. The Court made it clear that the first question must be answered before the second may even be considered.
>
> Section 199 (1) prescribed in personam jurisdiction only when the 'action accrued * * * or result[ed] from the doing of * * * business or * * * performing of * * * work or service [in the State].' This Court, therefore, need not reach the second question propounded by Judge Gewin.
>
> The Alabama Long-Arm Statute involved in this case, Code of Alabama, Title 7, Section 199 (1), is not a 'single act' or 'single tort' statute.

> The 'stream of commerce' theory of doing business, relied upon by the Third-Party Plaintiff, was rejected by the Court of Appeals for the Fifth Circuit in the case of *Barrett v. Browning Arms Company*, 433 F 2d 141 (5th Cir. 1970)."

The *Lindsey* Court further relied upon Judge Johnson of the Middle District in arriving at its decision that Alabama was not a single tort statute. It held as follows:

> "Judge Johnson recently held in *First National Life Insurance Company* v. *Fidelity and Deposit*, CA No 4032-N MD Alabama December 19, 1973 that:
>
> > 'Alabama, however, has not enacted a 'single tort' statute, but instead, has a statute which provides the one who does any business or performs any character of work or service in this state shall be liable to the jurisdiction of Alabama Courts in any action accrued, accruing or resulting from the doing of such business * * * Alabama Code, Title 7, Section 199 (1) (Supp 1971). Under the decisions construing this statute there must have occurred in this State some transaction of business in addition to the commission of the tort.' "

There now exists in the Fifth Circuit Court of Appeals two separate and distinct parallel but conflicting lines of decision concerning the Alabama

Long-Arm Statute. The case now at bar is the culmination of one line of cases. This line finds its origin in the case of *Boyd v. Warren Paint and Color Company*, 254 Ala. 687, 49 So. 2d 559, (1950). There the Supreme Court of Alabama misconceived the role of the Due Process Clause and misinterpreted the decisions of the Supreme Court of the United States dealing with the State's power to exercise jurisdiction over non-residents. It is not an error in construing the Alabama Statute, but a misconceived role of the Due Process Clause. For it is in that case that the misconception first finds its root by implying that the State of Alabama could assert jurisdiction over a defendant despite the absence of empowering state legislation simply because the due process clause would not prohibit it. Later in *New York Times Company v. Sullivan*, 273 Ala. 656, 144 So. 2d 25 (1962), rev'd on other gds. 376 U.S. 254, 84 S. Ct. 710, 11 L Ed 2d 686 (1963), the Supreme Court of Alabama re-enforced the prior recorded misconception by holding in a one sentence paragraph that:

> "The scope of substituted service is as broad as the permissible limits of due process. *Boyd v. Warren Paint & Color Co.*, 254 Ala. 687, 49 So. 2d 559; *Ex Parte Emerson*, 270 Ala. 697, 121 So. 2d 914."

The above statement is *dictum* for as this Court recognized in that appeal, the question of assumption of jurisdiction over the New York Times Company as being an overreaching of the territorial limits of the due process clause under the Alabama Long-Arm Statute could not be presented for review because of the waiver of all jurisdictional objections by the entrance of a general appearance by the Times in that action. What is interesting in the one paragraph statement of the Alabama Court concerning the breadth of substituted service is that the statement does not refer directly to Alabama's Long Arm Statute but rather is a general statement of law that all substituted service statutes regardless of their terms are as broad as permissible limits of due process. Perhaps a more appropriate statement by the Alabama Court would have been:

> "The scope of substituted service is as broad as the statutory base provided by the State Legislature which can extend no further than the limits of due process."

The *dictum* of the *New York Times Company* (supra) case became more confusing when the Court in *In Re Martin*, 281 Ala. 135, 199 So. 2d 836 (1967) decided to bracket in the above quote a reference to the Alabama Long-Arm Statute. There the court held:

> "This Court held in *New York Times Company v. Sullivan*, 273 Ala. 656, 144 So. 2d 25, that the scope of 'substituted service' [under Title 7, Section 199 (1)] is as broad as the permissible limits of due process.' It is assumed therefore that our statute is broad enough to reach Johnson under that construction and permissible under the due process clause of the Fourteenth Amendment to the Constitution of the United States."

The assumption in *In Re Martin*, (supra) seems unwarranted in view of the fact that the Alabama Supreme Court has misconceived the role of the due process clause and misinterpreted the decisions of the Supreme Court of the United States dealing with the State's power to exercise jurisdiction over non-residents.

3. The decision of the court below conflicts with the Fourth Circuit Court of Appeals' decision in *Beaty v. M. S. Steel Company*, 401 F 2d 157, (4th Cir. Maryland 1968) cert. denied, 1969 89 S Ct. 686). There the Fourth Circuit was dealing with a long-arm statute of the State of Maryland. The Maryland Statute was modeled upon, but was more restricted than, the Uniform Interstate and International Procedure Act. It differs from the Alabama Act in that it makes specific jurisdictional provision for tortious injury within the state by one who regularly does or solicits business or engages in any other persistent course of conduct in the State. The Fourth Circuit Court of Appeals recognized and cleared up the confusion and misconception which now exists in the Fifth Circuit's parallel and contradicting decisions concerning the Alabama Long-Arm Statute.

The Fourth Circuit Court of Appeals' case involves action against an alleged negligent Alabama manufacturer of prefabricated bar joists which allegedly collapsed while being installed at a construction site in Maryland resulting in injury to ironworkers. In determining that the Alabama corporation was not subject to Maryland jurisdiction, the court held as follows:

> "While plaintiffs-appellants urge upon us questions of constitutional dimension, we do not reach these issue unless a Federal statute or a state statute or rule of court authorizes an assertion of jurisdiction over this out-of-state defendant. Rule 4 (e) Fed. R. Civ. Proc. No statute of the United States empowers the District Court to exercise personal jurisdiction over the defendant on the facts of this case. Thus, our inquiry must be directed to the statutes and rules of Maryland, and a plain reading of that state's long-arm statute reveals that the Legislature has expressly declined to permit its courts to exercise jurisdiction in this situation."

The Fourth Circuit Court of Appeals further held:

> "From the premise that the Supreme Court would uphold as not constitutionally invalid authorization for the exercise of jurisdiction over the defendant who acts tortiously out of state and causes injury in the state, the district court concluded that it should subject the defendant to jurisdiction. The illustration of the two concentric circles is apt, but the conclusion undertakes to make the two circles identical. In short, the Court rendered nugatory the long-arm statute, and ignoring limitations embodied in the statute, asserted the jurisdiction to the full extent of the due process clause of the Fourteenth Amendment. In so doing, the District Court misconceived the role of the due process clause and mis-

interpreted the decisions of the Supreme Court dealing with the State's power to exercise jurisdiction over non-residents.

In every case cited by the District Court for the Western District of Virginia in *St. Clair v. Righter*, supra, for the proposition that it could assert jurisdiction over the defendant despite the absence of empowering state legislation, there was in fact a statute specifically authorizing the state courts exercising jurisdiction. Thus, in *McGee v. International Life Ins. Co.*, 355 U. S. 220, 78 S Ct. 199, 2 L Ed 2d 223, (1957), a California statute which subjected foreign corporations to suit in California on insurance contracts with residents of that state was held constitutionally sound. Similarly, *Hess v. Pawloski*, 274 U. S. 352, 47 S Ct. 632, 71 L Ed. 1091, (1927) and *Doherty & Co. v. Goodman*, 294 U. S. 623, 55 S. Ct. 553, 79 L Ed 1097 (1935), involved the constitutionality of state statutes either on their face or as applied.

In these cases, the due process clause was applied as a limit on the state's power and not a mandate for the exercise of that power as the District Court impliedly suggest.

* * *

Thus, it is clear that at least where the legislature has acted, even though the statute may not go to the limits of due process, the courts of

> a state may not go further and assert jurisdiction over persons not embraced within that legislation. Whether the Maryland legislature could, consonant with due process, have gone further than it did and subjected this defendant to jurisdiction is not the issue before us. We hold only that a Trial Court may not exercise more jurisdiction than the statute permits."

The Fourth Circuit Court of Appeals in the above quoted matters specifically holds that the due process clause alone does not affirmatively confer jurisdiction upon the District Court.

4. The decision of the Court below involves an important question of Alabama law which rises to constitutional proportions. Any applications of the Alabama Long-Arm Statute beyond the base of the statute should be fashioned by the legislature and the question here presented should be settled for the guidance of lower courts and the parties whose rights are substantially affected thereby.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be granted and the decree of the Court of Appeals should be reversed.

Respectfully submitted,

ROBERT H. SMITH
3100 Cottage Hill Road
Mobile, Alabama 36606
Counsel for Brookside
Corporation

CERTIFICATE OF COUNSEL

I, Robert H. Smith, one of the attorneys for the Petitioner herein, certify that copies of said Petition have been served on Samuel M. McMillan, attorney for the Respondent, by mailing the same to him, properly addressed and postage prepaid at his office address Post Office Box 2345, Mobile, Alabama, 36601 on this the ____ day of December, 1975.

Robert H. Smith

APPENDIX A

Garvis SELLS, Plaintiff,

versus

INTERNATIONAL HARVESTER CO., INC., Defendant-Appellant,

versus

BROOKSIDE CORP., Defendant-Appellant.

No. 74-4196

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

May 29, 1975.

Appeal from the United States District Court for the Southern District of Alabama.

Before THORNBERRY, MORGAN and RONEY, Circuit Judges.

PER CURIAM:

On June 29, 1972 Garvis Sells was driving a truck at or near the intersection of Alabama Highway 21 and

* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 5 Cir. 1970, 431 F.2d 409, Part I.

Interstate Highway 65 when a fan blade broke off from the engine, penetrated the floorboard, and severely cut Sells' foot. He sued the truck manufacturer, International Harvester Co., and the fan blade manufacturer, Brookside Corporation. International Harvester cross-claimed against Brookside for indemnity. Both Sells and International Harvester served Brookside under the Alabama Long-Arm Service Statute, and Brookside filed motions to dismiss both the complaint and cross-complaint for lack of in personam jurisdiction. The district court dismissed Sells' claim against both defendants with prejudice when the parties reached a settlement agreement. It then granted Brookside's motion to dismiss for lack of jurisdiction in the cross action. International Harvester now appeals, claiming that the trial court erred in dismissing the cross action. We find merit in International Harvester's position and reverse.

This court has considered the Alabama substituted service statute in the past, and noted that it extends to the limits of due process. "The Supreme Court of Alabama has consistently recognized that the issue of jurisdiction pursuant to substituted service of process under Alabama's long-arm statute is not controlled by state law but rather poses a federal question of whether subjection of the nonresident defendant to the sovereignty of Alabama comports with federal due process." King & Hatch, Inc. v. Southern Pipe & Supply Co., 435 F.2d 43, 44 (5th Cir. 1970). *See* In re Martin, 281 Ala. 135, 199 So.2d 836 (1967); New York Times Co. v. Sullivan, 273 Ala. 656, 144 So.2d 25 (1962), rev'd on other gds., 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1963); Boyd v. Warren Paint & Color Co., 254 Ala. 687,

49 So.2d 559 (1950). Where, as here, a manufacturer sells its product to a national distributor, knowing the product will be used in all states, it does not violate due process to require the manufacturer to defend a products liability suit in that state where the accident occurs. *See* Mack Trucks, Inc. v. Arrow Aluminum Castings Co., 510 F.2d 1029 (5th Cir. 1975); Coulter v. Sears Roebuck, Inc., 426 F.2d 1315 (5th Cir. 1970). Since the Alabama long-arm statute extends to due process limits, the district judge improperly dismissed International Harvester's cross-claim for lack of jurisdiction. Therefore we reverse and remand for consideration of the merits of the cross-claim.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

GARVIS SELLS,
Plaintiff,

versus

INTERNATIONAL HARVESTER COMPANY,
Defendant and
Cross Plaintiff

and Case No. 74-89-H

BROOKSIDE CORPORATION,
Defendant and
Cross Defendant

MOTION TO DISMISS CROSS-CLAIM FOR LACK OF JURISDICTION OVER DEFENDANT BROOKSIDE CORPORATION

Filed: Jul. 29, 1974

The defendant, Brookside Corporation, moves the Court as follows:

1. To dismiss the cross claim heretofore filed by the defendant, International Harvester Company, on the ground that the defendant Brookside Corporation, is a corporation organized under the laws of Indiana and was not and is not subject to service of process within the State of Alabama because it is not doing business therein.

COLLINS, GALLOWAY
& MURPHY
/s/ ROBERT H. SMITH
Robert H. Smith
ATTORNEYS FOR
BROOKSIDE CORPORATION
Post Office Box 4492
958 Dauphin Street
Mobile, Alabama 36604

CERTIFICATE OF SERVICE

I do hereby certify that I have on this the 23rd day of July, 1974, served a copy of the foregoing on counsel for all parties to this proceeding by mailing the same by United States Mail, properly addressed, and first class postage prepaid.

/s/ ROBERT H. SMITH
Robert H. Smith

MOTION GRANTED
8-16-74
/s/ W. B. HAND
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
213 U. S. COURTHOUSE & CUSTOM HOUSE
MOBILE, ALABAMA 36602

DATE: August 16, 1974

TO: Mr. Paul D. Owens, Jr., P. O. Drawer P. Brewton, Ala., 36426

Mr. Samuel L. McMillan, P. O. Box 2345, Mobile, Ala., 36601

Mr. Robert H. Smith, P. O. Box 4492, Mobile, Ala., 36604

RE: CIVIL ACTION NO. 74-89-H

GARVIS SELLS VS. INTERNATIONAL HARVESTER CO., ET AL

You are advised that on the 16th day of August, 1974 the following action was taken in the above styled cause by Judge W. BREVARD HAND:

1.) Motion to dismiss filed by defendant BROOKSIDE CORP. on June 28, 1974 is GRANTED.

2.) Motion to dismiss cross-claim filed by defendant BROOKSIDE CORP. on July 29, 1974 is GRANTED.

WILLIAM J. O'CONNOR,
CLERK
/s/ LAWRENCE C. STRAHER
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

GARVIS SELLS,
Plaintiff,

versus C.A. No. 74-89-11

INTERNATIONAL HARVESTER COMPANY, INC.,
Defendant.

CORRECTED FINAL JUDGMENT AS TO ALL PARTIES

It being called to the attention of the court that the order of this court dated the 31st day of October, 1974, dismissing this action, contains clerical errors, the said order is hereby amended nun pro tunc to conform to the intention of the court, and therefore,

It is hereby ordered, adjudged and decreed that this cause being settled, it is as to all defendants hereby dismissed on the merits with prejudice.

And there appearing no just reason for delay in the entry of a final judgment upon the cross claim of International Harvester Company against Brookside Corporation, it is hereby expressly directed and ordered, adjudged and decreed that a final judgment in favor of Brookside Corporation for want of jurisdiction over the person of Brookside Corporation be now entered upon said cross claim.

Costs taxed against defendant International Harvester Company.

DONE this 4th day of November, 1974.

/s/ W. B. HAND
UNITED STATES DISTRICT
JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-4196
Summary Calendar

D. C. Docket No. CA-74-89-H

GARVIS SELLS,
Plaintiff,

versus

INTERNATIONAL HARVESTER CO., INC.,
Defendant-Appellant,

versus

BROOKSIDE CORP.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Alabama

Before THORNBERRY, MORGAN and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for consideration of the merits of the cross-claim in accordance with the opinion of this Court;

It is further ordered that defendant-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

May 29, 1975

Issued as Mandate:

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

October 22, 1975

TO ALL COUNSEL OF RECORD

No. 74-4196 — Garvis Sells vs. International Harvester Co., Inc. vs. Brookside Corp.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH
Clerk
/s/ CLARE F. SACHS
Deputy Clerk

cc: Mr. Samuel McMillan
Mr. Robert H. Smith
Mr. Paul D. Owens, Jr.

APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

November 6, 1975

Mr. Robert H. Smith
Attorney at Law
P. O. Box 4492
Mobile, Alabama 36604

No. 74-4196 - Garvis Sells vs. International Harvester Co., Inc. vs. Brookside Corp.

MANDATE STAYED TO AND INCLUDING
December 6, 1975

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,
EDWARD W. WADSWORTH
Clerk
/s/ CAROL G. LE SAGE
Deputy Clerk

enc.
cc: Mr. Samuel McMillan
Mr. Paul D. Owens, Jr.

APPENDIX F

APPENDIX

TITLE 7, SECTION 199(1)

§ 199(1). Service on non-resident doing business or performing work or service in state. — Any nonresident person, firm, partnership, general or limited, or any corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall do any business or perform any character of work or service in this state shall, by the doing of such

business or the performing of such work, or services, be deemed to have appointed the secretary of state, or his successor or successors in office, to be the true and lawful attorney or agent of such nonresident, upon whom process may be served in any action accrued, accruing, or resulting from the doing of such business, or the performing of such work or service, or relating to or as an incident thereof, by any such nonresident, or his, its or their agent, servant or employee. And such service shall be valid whether or not the acts done in Alabama shall of and within themselves constitute a complete cause of action. Service of such process shall be made by serving three copies of the process, with a fee of $10 (ten dollars), with the said secretary of state, and such service shall be sufficient service upon the said nonresident of the state of Alabama, provided that notice of such service and a copy of the process are forthwith sent by registered mail by the secretary of the state to the defendant at his last known address, which shall be stated in the affidavit of the plaintiff or complainant hereinafter mentioned, marked "Deliver to Addressee Only" and "Return Receipt Requested," and provided further that such return receipt shall be received by the secretary of state purporting to have been signed by said nonresident, or the secretary of state shall be advised by the postal authority that delivery of said registered mail was refused by said nonresident; and the date on which the secretary of state receives said return receipt, or advice by the postal authority that delivery of said registered mail was refused, shall be treated and considered as the date of service of process on said nonresident. The secretary of state shall make an affidavit as to the service of said process on him, and as

to his mailing a copy of the same and notice of such service to the nonresident, and as to the receipt of said return receipt, or advice of the refusal of said registered mail, and the respective dates thereof, and shall attach said affidavit, return receipt, or advice from the postal authority, to a copy of the process and shall return the same to the clerk or register who issued the same, and all of the same shall be filed in the cause by the clerk or register. The party to a cause filed or pending, or his agent or attorney, desiring to obtain service upon a nonresident under the provisions of this section shall make and file in the cause an affidavit stating facts showing that this section is applicable, and stating the residence and last known post office address of the nonresident, and the clerk or register of the court in which the action is filed shall attach a copy of the affidavit to the writ or process, and a copy of the affidavit to each copy of the writ or process, and forward the original writ or process and three copies thereof to the sheriff of Montgomery county for service on the secretary of state and it shall be the duty of the sheriff to serve the same on the secretary of state and to make due return of such service. The court in which the cause is pending may order such continuance of the cause as may be necessary to afford the defendant or defendants reasonable opportunity to make defense. Any person who was a resident of this state at the time of the doing of business, or performing work or service in this state, but who is a nonresident at the time of the pendency of a cause involving the doing of said business or performance of said work or service, and any corporation which was qualified to do business in this state at the time of doing business herein and which is not qualified at the

time of the pendency of a cause involving the doing of such business, shall be deemed a nonresident within the meaning of this section, and service of process under such circumstances may be had as herein provided.

The secretary of state of the state of Alabama, or his successor in office, may give such nonresident defendant notice of such service upon the secretary of state of the state of Alabama in lieu of the notice of service hereinabove provided to be given, by registered mail, in the following manner: By causing or having a notice of such service and a copy of the process served upon such nonresident defendant, if found within the state of Alabama, by any officer duly qualified to serve legal process within the state of Alabama, or if such nonresident defendant is found without the state of Alabama, by a sheriff, deputy sheriff, or United States marshal, or deputy United States marshal, or any duly constituted public officer qualified to serve like process in the state of the jurisdiction where such nonresident defendant is found; and the officer's return showing such service and when and where made, which shall be under oath, shall be filed in the office of the clerk or register of the court wherein such action is pending.

Service of summons when obtained upon any such nonresident as above provided for the service of process herein shall be deemed sufficient service of summons and process to give to any of the courts of this state jurisdiction over the cause of action and over such nonresident defendant, or defendants, and shall warrant and authorize personal judgment against

such nonresident defendant, or defendants, in the event that the plaintiff prevails in the action.

The secretary of state shall refuse to receive and file or serve any process, pleading, or paper under this section unless three copies thereof are supplied to the secretary of state and a fee of $10 (ten dollars) is paid to the secretary of state; and no service shall be perfected hereunder unless there is on file in the office of the secretary of state a certificate or statement under oath by the plaintiff or his attorney that the provisions of this section are applicable to the case. (1949, p. 154 §§1, 2, appvd. June 23, 1949; 1951, p. 976, appvd. Aug. 28, 1951, p. 347, § 1, appvd. Aug. 5, 1953; 1961, p. 1390, appvd. Sept. 8, 1961; 1973, No. 864, § 3, effective Oct. 1, 1973.)

APPENDIX G

CITIZENSHIP

Amend. 14

AMENDMENT XIV. — CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representative in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may

by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

HISTORICAL NOTE

Proposal and Ratification. This amendment was proposed to the legislatures of the several States by the Thirty-ninth Congress, on June 13, 1866. On July 21, 1868, Congress adopted and transmitted to the Department of State a concurrent resolution, declaring that "the legislatures of the States of Connecticut, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, New Hampshire, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three-fourths and more of the several States of the Union, have ratified the fourteenth article of amendment to the Constitution of the United

States, duly proposed by two-thirds of each House of the Thirty-ninth Congress: Therefore, Resolved, That said fourteenth article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State." The Secretary of State accordingly issued a proclamation, dated July 28, 1868, declaring that the proposed fourteenth amendment had been ratified by the legislatures of thirty of the thirty-six States. The amendment was ratified by the State Legislatures on the following dates: Connecticut, June 25, 1866; New Hampshire, July 6, 1866; Tennessee, July 19, 1866; New Jersey, Sept. 11, 1866; Oregon, Sept. 19, 1866; Vermont, Oct. 30, 1866; New York, Jan. 10, 1867; Ohio, Jan. 11, 1867; Illinois, Jan. 15, 1867; West Virginia, Jan. 16, 1867; Michigan, Jan. 16, 1867; Kansas, Jan. 11, 1867; Minnesota, Jan. 16, 1867; Maine, Jan. 19, 1867; Nevada, Jan. 22, 1867; Indiana, Jan. 23, 1867; Missouri, Jan. 25, 1867; Rhode Island, Feb. 7, 1867; Pennsylvania, Feb. 12, 1867; Wisconsin, Feb. 17, 1867; Massachusetts, Mar. 20, 1867; Nebraska, June 15, 1867; Iowa, Mar. 16, 1868; Arkansas, Apr. 6, 1868; Florida, June 9, 1868; North Carolina, July 2, 1868; Louisiana, July 9, 1868; South Carolina, July 9, 1868; Alabama, July 13, 1868; Georgia, July 21, 1868. Subsequent to the proclamation the following States ratified this amendment: Virginia, Oct. 8, 1869; Mississippi, Jan. 17, 1870; Texas, Feb. 18, 1870; Delaware, Feb. 12, 1901, and California, May 6, 1959.

The Fourteenth Amendment originally was rejected by Delaware, Georgia, Louisiana, North Carolina, South Carolina, Texas and Virginia. However, the State Legislatures of the aforesaid States subsequent-

ly ratified the amendment on the dates set forth in the preceding paragraph. Kentucky and Maryland rejected this amendment on Jan. 10, 1867 and Mar. 23, 1867, respectively.

The States of New Jersey, Ohio and Oregon "withdrew" their consent to the ratification of this amendment on Mar. 24, 1868, Jan. 15, 1868, and Oct. 15, 1868, respectively.

For the proposal and ratification of all the Amendments to this Constitution, see the historical note preceding Amend. 1.

Section 1. Citizens of United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.
* * *

APPENDIX H

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-4196

GARVIS SELLS,
Plaintiff

versus

INTERNATIONAL HARVESTER CO., INC.
Defendant-Appellant,

versus

BROOKSIDE CORP.,
Defendant-Appellee

MOTION FOR ADDITIONAL STAY OF MANDATE PURSUANT TO RULE 41(b) OF FEDERAL RULES OF APPELLATE PROCEDURE

Comes now Brookside Corp. by and through its attorney and moves this Court for an additional stay of the issuance of the mandate in the above styled cause and shows unto this Court as follows:

1. That this defendant did heretofore and timely file for a stay of the Court's mandate on the 27th day of October, 1975.

2. That on November 6, 1975 the Court granted the stay of the mandate to and including December 6, 1975.

3. That the petition for the Writ of Certiorari to the Fifth Circuit Court of Appeals has now been prepared and is being mailed this day to Brookside's printer in New Orleans, Louisiana for preparation to be filed in the United States Supreme Court.

4. Because of the possible time delay in mailing from Mobile to New Orleans, the printer's schedule in completing the petition, and the mailing time from New Orleans to Washington, D. C. Brookside prays for an additional stay of two (2) weeks from December 6, 1975 for the filing of the petition for Writ of Certiorari in the Supreme Court of the United States.

COLLINS, GALLOWAY
& SMITH
/s/ ROBERT H. SMITH
Robert H. Smith
ATTORNEYS FOR
BROOKSIDE CORP.
Post Office Box 16629
Mobile, Alabama 36616
205 476-4493

CERTIFICATE

I do hereby certify that I have on this the 26th day of November, 1975, served a copy of the foregoing on counsel for all parties to this proceeding by mailing the same by United States Mail, properly addressed, and first class postage prepaid.

/s/ ROBERT H. SMITH
ROBERT H. SMITH